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No. 86-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES P. MCKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, AND VETERANS' ADMINISTRATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a regulation of the Veterans' Administration that conclusively defines alcoholism as willful misconduct, and which was applied to prevent petitioner, an alcoholic, from obtaining an extension of time in which to use educational benefits, when such extensions were available to veterans who suffered from other disabilities, discriminates against the handicapped in violation of section 504 of the Rehabilitation Act of 1973.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

James P. McKelvey petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (App., *infra*, 1a-31a) are reported at 792 F.2d 194 (D.C. Cir. 1986). The opinion of the District Court (App., *infra*, 32a-47a), which was reversed by the Court of Appeals, is reported at 596 F.Supp. 1317 (D.D.C. 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1986. (App., *infra*, 48a.) Petitioner's timely motion for rehearing and rehearing *en banc* was denied on August 7, 1986, with four judges of the D.C. Circuit voting

to grant *en banc* rehearing. (App., *infra*, 49a, 50a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

Time limitations for using veterans' educational benefits are established by 38 U.S.C. § 1662(a)(1) (1982), which provides in pertinent part:

> "No education assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall . . . be granted an extension of the applicable delimiting date for such length of time as the Administrator determines, from the evidence, that such veteran was so prevented from initiating or completing such a program of education."

The Veteran's Administration regulation at issue, codified at 38 C.F.R. § 3.301(c)(2) (1986), provides:

> "The simple drinking of alcoholic beverage is not itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or

> death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin."

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), provides in pertinent part:

> "No otherwise qualified handicapped individual in the United States, as defined in § 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive Agency . . . ."

STATEMENT OF THE CASE

James P. McKelvey is an alcoholic.

On September 9, 1963, Mr. McKelvey enlisted in the United States Army. During his enlistment, he received several disciplinary sanctions, all drinking-related. Mr. McKelvey was honorably discharged from the Army on or about September 9, 1966, and was thus entitled to the benefits of the GI Bill, including educational benefits. 38 U.S.C. § 1661 (1982). In the nine years after his honorable discharge, Mr. McKelvey was hospitalized repeatedly for alcoholism and related problems. (App., *infra,* 4a.) Between hospitalizations, Mr. McKelvey attended two educational institutions, using veterans' benefits. He was unable to complete his education because of the debilitating effects of his alcoholism.

Mr. McKelvey had his last drink of alcohol in May 1975. (App., *infra*, 4a.) He subsequently received regular psychiatric treatment. He has been employed on a full-time basis since July 1975, and has worked during the past nine years as an alcoholism counselor.

On September 10, 1976, the ten year delimiting date for use of Mr. McKelvey's educational benefits passed. In 1977, pursuant to 38 U.S.C. § 1662(a)(1) (1982), he sought an extension of that delimiting date on the ground that his alcoholism had prevented earlier use of his benefits in full. (App., *infra*, 4a.) His request was denied by the Veterans' Administration ("VA"), which determined that Mr. McKelvey's disability had resulted from "willful misconduct" which, under the statute, precluded such an extension; the VA's determination was based exclusively upon a regulation that conclusively defines alcoholism as "willful misconduct." 38 C.F.R. § 3.301(c)(2) (1986) ("the willful misconduct regulation").

Mr. McKelvey appealed the VA's decision. In July 1980, at the Board of Veterans' Appeals hearing on Mr. McKelvey's case, the Chairman stated:

> "I want to make one thing clear . . . I am aware of the medical disagreement about what kind of an animal alcoholism is. As far as we are concerned at the Board of Veterans' Appeals, *we don't have discretion to say that primary alcoholism is a disease*. It is defined in the regulations as willful misconduct and whether we want to call it a disease or not, we have no authority to do that, we are bound by those regulations . . . ."
>
> Transcript of Administrative Hearing, July, 1980, quoted in part at 596 F. Supp. 1321 (App., *infra*, 38a) (emphasis added).

Because the Board found "no evidence that an acquired psychiatric disease preceded [McKelvey's] alcoholism" (App., *infra*, 5a), it determined that Mr. McKelvey's alcoholism was "willful" and denied an extension. (App., *infra*, 5a.)

Mr. McKelvey then challenged the Board's decision in the United States District Court for the District of Columbia, invoking the court's jurisdiction pursuant to 28 U.S.C. § 1331 (1982). Mr. McKelvey raised both constitutional and statutory issues, including a claim that the willful misconduct regulation violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). District Judge Barrington Parker granted summary judgment for Mr. McKelvey on the Rehabilitation Act claim. *McKelvey* v. *Walters*, 596 F. Supp. 1317 (D.D.C. 1984) (App., *infra*, 32a-47a).

The Veterans' Administration sought review in the United States Court of Appeals for the District of Columbia Circuit, invoking that court's jurisdiction pursuant to 28 U.S.C. § 1291 (1982). On May 30, 1986, a divided panel of that court, consisting of Judges Ginsburg, Starr, and Scalia, reversed the decision of the District Court.[1] Judge Ginsburg dissented.

The majority reasoned that the willful misconduct regulation merely regulated the distribution of benefits on the basis of conduct. It held that the Veterans' Administration had reasonably concluded that alcoholism is a "willfully caused handicap" (App., *infra*, 11a), and stated that it was "initially the VA's responsibility, and not ours, to determine what is 'willful misconduct' ". (App., *infra*, 13a). The

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[1] The Court of Appeals remanded the case to the District Court for consideration of constitutional issues raised in the complaint. Mr. McKelvey will not pursue those issues, thus rendering the case appropriate for review by this Court.

majority concluded that the willful misconduct regulation "is a permissible means of discriminating among those suffering from alcoholism on the basis of their *conduct*." (App., *infra*, 13a). In so holding, the majority explicitly recognized (App., *infra*, 13a n.4) that its decision conflicted with *Tinch* v. *Walters*, 765 F.2d 599 (6th Cir. 1985), in which the Sixth Circuit, facing the identical issue, held that the willful misconduct regulation violates Section 504.

In her dissent, Judge Ginsburg examined the requirements for relief under Section 504, and concluded that Mr. McKelvey satisfied each of them.[2] She noted initially that alcoholics are "handicapped" under the Act, that the Veterans' educational assistance program is subject to Section 504, and that Mr. McKelvey is "otherwise qualified" to participate in the VA's educational benefit program (App., *infra*, 18a-19a). She then demonstrated that the majority erred in concluding that the willful misconduct regulation is based on conduct, noting that "under the majority's analysis, the government can never discriminate on the basis of alcoholism unless it explicitly admits that it is discriminating against alcoholics solely because they are handicapped. This mode of analysis effectively nullifies § 504 coverage of alcoholics." (App., *infra*, 21a).[3]

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[2] To establish discrimination under Section 504, a plaintiff must show (1) that he is a "handicapped individual" under the Act; (2) that he is "otherwise qualified" for the program of benefits from which he has been excluded; (3) that he has been excluded "solely" because of his handicap; and (4) that the program from which he has been excluded is subject to § 504. App., *infra*, 17a-18a; Doe v. New York University, 666 F.2d 761, 774-75 (2d Cir. 1981).

[3] All three judges below rejected the VA's arguments that legislative events after 1978, when Section 504 was amended to confirm that it applied to federal benefit programs, demonstrate that alcoholism may be treated as willful misconduct. App., *infra*, 9a-10a; 24a-26a.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with the decision of the Sixth Circuit in *Tinch* v. *Walters*, 765 F.2d 599 (6th Cir. 1985), as well as district court decisions in two other circuits. Unlike the majority below, each of the other four Court of Appeals judges and three district judges who have considered the question have concluded that the willful misconduct regulation violates Section 504 of the Rehabilitation Act. Moreover, the decision below rests on an erroneous rationale which, if upheld, could emasculate the protections afforded alcoholics by Section 504 of the Act. Review by this Court is clearly warranted.

I. THE DECISION OF THE COURT BELOW DIRECTLY CONFLICTS WITH A RECENT DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DECISIONS OF OTHER FEDERAL COURTS.

As the majority recognized, the decision below conflicts directly with the recent decision of the Sixth Circuit in *Tinch* v. *Walters*. Mr. Tinch was an alcoholic who, like Mr. McKelvey, was denied an extension of the time in which to use his educational benefits solely because of the willful misconduct regulation. The Sixth Circuit panel unanimously held that the willful misconduct regulation violates Section 504 of the Rehabilitation Act.

The majority below criticized *Tinch* v. *Walters* because it purportedly failed to recognize that discrimination against alcoholics under the willful misconduct regulation was based not on their handicap, but on the VA's "reasonable" determination that alcoholism is willful misconduct. The discrimination resulting from the willful misconduct regulation was based, in the majority's strained view, not on

Mr. McKelvey's handicap — alcoholism — but on his conduct — alcoholism. (App., *infra*, 10a, 14a).

In contrast, the Sixth Circuit correctly reasoned that a regulation which, by definition, excludes from the program a class of individuals recognized as handicapped under the Rehabilitation Act of 1973, solely because of their handicap, is impermissibly discriminatory. 765 F.2d at 603-604. The Sixth Circuit's conclusion relies on a common-sense understanding of the word "discrimination," rather than the illusory distinction of the majority below. The Sixth Circuit explicitly rejected the suggestion that the federal government may disregard Section 504 and discriminate against the handicapped. *Id.* at 604 n.5.

The Sixth Circuit's view is supported by district court decisions in at least two other circuits. In *Davis* v. *Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978), the court concluded that the exclusion of former drug abusers from consideration for city employment under programs receiving federal funds violates Section 504 of the Rehabilitation Act. *Id.* at 796-97. And in *Traynor* v. *Walters*, 606 F. Supp. 391 (S.D.N.Y. 1985), *rev'd on other grounds*, 791 F.2d 226 (2d Cir. 1986), District Judge Cooper, when presented with facts identical to those at issue here, concluded that the "willful misconduct" regulation violates Section 504.[4]

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[4] Judge Parker in this case, 596 F.Supp. 1317 (D.D.C. 1984), and Judge Taylor in Tinch V. Walters, 573 F.Supp. 346 (E.D. Tenn. 1983), reached the same conclusion as Judge Cooper.

A divided panel of the Second Circuit reversed *Traynor* because it concluded that 38 U.S.C. § 211(a) (1982) precluded judicial review. A petition for certiorari has been filed with this Court seeking review of the Second Circuit's decision in *Traynor*. No. 86-622 (Oct. 14, 1986). The court below concluded that it had jurisdiction to hear this case. App., *infra*, *6a-9a*.

The majority decision of the D.C. Circuit conflicts directly with decisions of courts in other circuits in identical or similar factual situations. Had Mr. McKelvey filed suit in the Sixth Circuit or other Circuits, he might now be using his educational benefits. The conflict among the federal courts is clear, and the writ should be granted to resolve it.

II. THE COURT BELOW INCORRECTLY DECIDED THE QUESTION PRESENTED.

The decision below rests on an improper analysis which negates the protections provided alcoholics under § 504 of the Rehabilitation Act of 1973. The majority concluded that the willful misconduct regulation simply categorizes a class of handicapped individuals on the basis of their conduct, and that discrimination on the basis of conduct is permissible. (App., *infra*, 14a.) As Judge Ginsburg noted, the majority's view would mean that discrimination on the basis of alcoholism could never be successfully challenged, because it could always be explained as regulation based on conduct. See page 6, *supra*.

The majority below also states that the Veterans' Administration may determine whether alcoholism is willful misconduct. (App., *infra*, at 13a.) This is simply incorrect. *Congress* has determined by statute that alcoholism is a handicap under the Rehabilitation Act, a determination that the VA may not challenge. [5] (App., *infra*, at 18a.) The

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[5] Such a challenge would be futile. All three judges below recognized that alcoholism is a handicap under § 504. App., *infra*, 14a, 18a. The Attorney General of the United States has reviewed the legislative history of § 504 and concluded that alcoholics are handicapped individuals. 43 Op. Att'y Gen. No. 12 at 2 (April 12, 1977). Subsequently, the predecessor of the Department of Health and Human Services issued guidelines reflecting this conclusion, 43 Fed. Reg. 2137 (1978), and the Veterans' Administration adopted those guidelines by regulation. 38 C.F.R. § 18.403(j)(2)(i)(C)

(footnote continues)

majority below thus completely undermines the protection afforded alcoholics *by statute* by permitting the VA *by regulation* to classify alcoholism as conduct. Section 504 prohibits limitation of eligibility for federal programs because of an individual's handicap, but through the willful misconduct regulation the VA has achieved just such a result. The regulation accordingly should be invalidated.

Questioning the implications of the result reached by the District Court, the majority below suggested that if the Rehabilitation Act precludes the VA from treating alcoholism as willful misconduct in the context of time limits, the same must be true in determining the availability of service-related disability compensation. 38 U.S.C. § 310 (1982). (App., *infra*, 12a n.3). The majority thus speculated that disability compensation payments would provide an incentive for unreformed alcoholics to continue to drink. None of the other seven federal judges who have considered the question was concerned about this "problem," nor should they have been. In the first place the issue that troubled the majority below is an issue of federal policy, one more properly addressed to Congress than to a federal Court of Appeals. [6] Moreover, as Judge Ginsburg noted in her dissent

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(footnote continued)

(1986). Several other courts have recognized that alcoholics are handicapped under § 504. *E.g.*, Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); Whitaker v. Board of Higher Education, 461 F. Supp. 99, 106 n.7 (E.D.N.Y. 1978); Davis v. Bucher, 451 F. Supp. 791, 796-97 and n.4 (E.D. Pa. 1978).

[6] Congress has addressed such problems in the past. For example, in the context of job discrimination, Congress specifically removed alcoholics from the Rehabilitation Act's definition of "handicapped individual" if the alcoholism would prevent the individual from performing the job in question or would threaten the safety or property of others. 29 U.S.C. § 706(7)(B) (1982). Similarly, if the application of the willful misconduct regulation to the service-related disability program were truly a problem, Congress could easily act to correct it.

(App., *infra*, 26a-27a), the problem about which the majority is concerned is illusory and provides no justification for the VA's discriminatory regulation. [7]

III. THE DECISION OF THE COURT BELOW WILL ADVERSELY AFFECT THE RIGHTS OF ALCOHOLICS UNDER THE REHABILITATION ACT.

The decision below opens the way for federal and state agencies to deny alcoholics opportunities under federal or

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[7] The regulations implementing the Rehabilitation Act include the following provision:

> "[T]he exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by [the Act]." App., *infra*, 12a, 27a, quoting 28 C.F.R. § 41.51(c) (1986).

This regulation distinguishes the service-related disability compensation program from the educational benefits program. The former program is limited by federal statute to disabilities resulting from injuries or diseases suffered or aggravated in the line of duty during a period of war, 38 U.S.C. § 310 (1982), and thus would usually exclude alcoholics. In contrast, the automatic denial to alcoholics of extensions of time in which to use VA educational benefits results not from a statute establishing the program's scope, but only from regulations putting the VA's gloss on statutory language. The discrimination, in other words, is not part of the definition of the program, but relates only to the program's administration. App., *infra*., 27a-28a.

The majority also asserted that the willful misconduct regulation affects merely the "exclusion of . . . a specific class of handicapped persons from a program limited by federal statute . . . to a different class of handicapped persons" because it applies not to the Educational Benefits Program in its entirety, but only the Educational Benefits Program after ten years has elapsed. App., *infra*, 12a n.3. To hold that the Educational Benefits Program somehow becomes new and different after ten years defies common sense, and defines the word "program" so narrowly that it ultimately erodes the concept "discrimination." If the Veterans' Administration or other agencies could explain every act of discrimination against alcoholics in favor of other handicapped individuals as simply the exclusion of alcoholics from a narrowly defined program, discrimination against alcoholics could never be successfully challenged in any program for the handicapped. App., *infra*, 28a.

federally-supported programs that are afforded other individuals whose handicaps do not carry the stigma attached to alcoholism.[8] To cite only one example, in *Davis* v. *Bucher*, *supra*, the court invalidated under Section 504 regulations that enabled the city of Philadelphia to refuse to hire reformed alcoholics or drug abusers for city jobs, including jobs supported by the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 841 *et seq* (1982). But the decision below would permit a program sponsor to adopt regulations calling alcoholism "conduct," and thus discriminate against alcoholics on that basis.

The problem is not insignificant. There are millions of alcoholics in the United States today. A report by the National Research Council estimated that in the years 1971-1976 1.2% of the adult population, nearly three million people, consumed more than five ounces of alcohol, the equivalent of ten drinks, daily. National Research Council, Alcohol and Public Policy: Beyond the Shadow of Prohibition, p. 28, National Academy Press (1981). The protections afforded alcoholics by the Rehabilitation Act have a positive impact on the lives of many people, and should not be destroyed by the strained judicial construction of the majority below.

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[8] It is this concern that makes this case so vitally important. Because of changes in the VA's educational benefit program, cases identical to Mr. McKelvey's may not arise in the future. 38 U.S.C. § 1662. However, the risk presented by this case, that alcoholics may be excluded from federal programs merely by the use of carefully chosen regulatory language, is very real.

CONCLUSION

For the reasons discussed above, and particularly to correct the square conflict between the circuits, the Petition for a Writ of Certiorari should be granted.

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